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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/988,651	11/20/2001	David L. Larkin	TI-23422.1	8936
23494 7590 01/08/2010 TEXAS INSTRUMENTS INCORPORATED P O BOX 655474, M/S 3999 DALLAS, TX 75265				
EXAMINER				
ANYA, IGWE U				
ART UNIT		PAPER NUMBER		
2891				
NOTIFICATION DATE		DELIVERY MODE		
01/08/2010		ELECTRONIC		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID L. LARKIN, GEORGE E. HARRIS,
and WILLIAM D. SMITH

Appeal 2009-001599
Application 09/988,651
Technology Center 2800

Decided: January 06, 2010

Before BEVERLY A. FRANKLIN, LINDA M. GAUDETTE, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants request reconsideration of our Decision of July 29, 2009 (“Decision”), wherein we sustained the Examiner’s rejections of the appealed claims under 35 U.S.C. §§ 102 and 103. (Request for Rehearing (“Req.”), filed Sep. 8, 2009.)

We have reviewed our Decision in light of the arguments presented by Appellants in the Request. However, we are not persuaded that our Decision was in error.

Appellants' arguments are based, in general, on their contention that the Board applied an overly broad interpretation of the claims as encompassing a semiconductor device that is less than substantially saturated with hydrogen.

"During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow." *In re Zletz*, 893 F.2d 319, 321-22 (Fed. Cir. 1989). The broadest reasonable interpretation of the claims must be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1358 (Fed. Cir. 1999). "[E]ach claim does not necessarily cover every feature disclosed in the specification. When the claim addresses only some of the features disclosed in the specification, it is improper to limit the claim to other, unclaimed features." *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 689-90 (Fed. Cir. 2008) (quoting *Ventana Med. Sys., Inc. v. Biogenex Labs., Inc.*, 473 F.3d 1173, 1181 (Fed. Cir. 2006)); *see also*, *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1331 (Fed. Cir. 2004) ("[P]atentees [are] not required to include within each of their claims all of [the] advantages or features described as significant or important in the written description.").

With respect to a Request for Rehearing, 37 C.F.R. § 41.52(a)(1) provides that an Appellant must "state with particularity the points believed to have been misapprehended or overlooked by the Board" in its Decision. This section further states that "[a]rguments not raised in the briefs before

the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing.” *Id.*

In our Decision, we noted that “Appellants [did] not dispute” the Examiner’s finding that

[o]ne of ordinary skill in the art would be aware that “hydrogen diffuses out of silicon over time, so the level of hydrogen in the semiconductor’s *final* structure will be lower than the hydrogen level immediately following the hydrogenation treatment. As such, even a device that was initially ‘completely saturated’ with hydrogen would eventually lose hydrogen until it is less than saturated.”

(Dec. 8-9 (quoting Ans. 14).) We likewise identified as undisputed, the Examiner’s determination that “[t]he claims are drafted in product-by-process format and, therefore, do not limit the final, claimed semiconductor device to one which is substantially saturated with hydrogen.” (Dec. 8 (citing Ans. 14).) In their Appeal and Reply Briefs, Appellants did not identify any claim language in dispute, nor was any disagreement over the meaning of claim terms apparent to us from a reading of the Briefs and Answer. Our analysis of the prior art rejections was, therefore, properly based on the Examiner’s undisputed, and broadest reasonable interpretation of the claims as encompassing a semiconductor device which is less than substantially saturated with hydrogen. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (noting that Appellant has the burden on appeal to the Board to demonstrate error in the Examiner’s position);

37 C.F.R. § 41.37(c)(1)(vii) (“Any arguments or authorities not included in the brief or a reply brief filed pursuant to § 41.41 will be refused consideration by the Board, unless good cause is shown.”).

Appellants' Request for Rehearing is based on an argument which was not previously raised in their Appeal Brief or Reply Brief, namely, that the Examiner applied an overly broad interpretation of the claims as encompassing a semiconductor device that is less than substantially saturated with hydrogen. Because this argument was not previously made, it is improper for Appellants to now identify the Examiner's claim interpretation as a point believed to have been misapprehended or overlooked by the Board. Accordingly, we decline to consider the merits of Appellants' Request.

In conclusion, based on the foregoing, we have granted Appellants' request to the extent that we have reconsidered our Decision, but we deny Appellants' request to make any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

DENIED

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